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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 263

FRED BERNARD DeGILLIO and
MILTON SILVERMAN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

GOLDFARB & HUDNUT
2001 Cadillac Tower
Detroit 26, Michigan

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Fred Bernard DeGillio and Milton Silverman, pray that a Writ of Certiorari issue to review the order of the Supreme Court of Michigan entered on the 10th day of April, 1963, denying the petitioners leave to appeal from a judgment of conviction entered in the Circuit Court for the County of Genesse, Michigan, wherein the petitioners, Fred Bernard DeGillio and Milton Silverman were sentenced to Jackson Prison.

JURISDICTION

Jurisdiction of this Court is invoked because the Orders of the Supreme Court of the State of Michigan denying petitioners leave to review their conviction, deprived petitioners of their Constitutional protection of Due Process under the Fourteenth Amendment of the Federal Constitution, and deprived them of their Constitutional Guarantee of Counsel under the Sixth Amendment of the United States Constitution.

QUESTIONS INVOLVED

A. Whether the Petitioners were denied their constitutional right to counsel when the Court refused to continue the Preliminary Examination for one day to enable the counsel retained by Petitioners to appear in Court in their behalf?

B. Whether the Petitioners were denied due process of law when the Court permitted the jury to hear and take into the jury room stenographic copies of Petitioners' refusal to answer questions without the assistance of counsel, when said statements embodied assertions by the prosecuting authorities that the Petitioners had committed crime in the past and that the prosecution believed them to be guilty of the crime with which they were charged herein?

C. Whether the Petitioners were deprived of due process of law because the information upon which they were charged was vague and indefinite and did not charge a crime known to the law of the State of Michigan?

SUMMARY STATEMENT OF FACTS

In June of 1960 the complaining witnesses, Mark and

Gabrieline Lavrack advertised their home located at 6115 Penwood, Mount Morris, Michigan, indicating that their equity therein was for sale. The home at that time was subject to a mortgage of $15,878.73. The Petitioners agreed to purchase the equity for $500.00 and to assume the mortgage thereon. The deal was consummated through a real estate broker who was a friend of the Lavracks.

In January of 1961, Petitioners were arrested on a criminal warrant which charged them in two counts of obtaining real estate by false pretenses and conspiracy to obtain real estate by false pretenses.

At the time of their arrest on the 18th day of January, 1961, Petitioners were taken into the office of the prosecuting attorney. Petitioner Milton Silverman refused to answer any questions insisting upon his right to counsel. The prosecuting attorney suggested by innuendo that the Petitioner Silverman was on Federal probation. Silverman never defended himself against this statement and did not testify at the trial. When the Petitioner DeGillio was questioned he also insisted upon his right to counsel and the prosecuting attorney refused to let him see counsel, stating that he thought he was a criminal and that was why he issued the warrant.

Thereafter the Petitioners were arraigned before a magistrate and an examination was set for February 15, 1961. Prior to February 15, 1961, Petitioners retained Albert A. Goldfarb to represent them on this matter. On February 13, Albert A. Goldfarb, advised the prosecuting attorney that he was in the middle of a jury trial in the Federal District Court and requested an adjournment for the Preliminary Examination for one day to enable him to get to Genesee County to appear with the Petitioners at the

examination. The Prosecuting attorney advised Mr. Goldfarb that he would have no objection to such an adjournment. Thereafter on February 15, 1961, Petitioners appeared before the examining magistrate and advised him that their counsel was engaged in a trial in the United States District Court, sitting in Detroit, Michigan, and requested a continuance to enable their counsel to appear. A continuance was denied upon the magistrate's statement that "Counsel or no counsel, as far as I am concerned the case will proceed as scheduled."

The magistrate bound the Petitioners over for trial to the Circuit Court for the County of Genesee and an Information was filed charging the Petitioners with obtaining real estate by false pretenses and conspiracy to obtain real estate by false pretenses.

A Motion to quash the Information was filed on behalf of the Petitioners in which it was asserted that at said Preliminary Examination Petitioners' constitutional right to counsel was violated. The Motion was denied and the case was set for trial on March 9, 1961. Prior to the taking of any testimony at the trial Petitioners again renewed their motion based on the denial of their right to counsel and the allegation that the second count of the information did not charge a crime known to the law of Michigan.

At the trial, over the objection of counsel, the written statements in which the Petitioners had insisted upon their right to counsel were admitted as evidence for the prosecution, and designated as Exhibits 3 and 4. They were used as a basis for argument to the jury by the prosecution and were given to the jury to take in the jury room. The Court directed a verdict of not guilty on the count of obtaining property under false pretenses, upon the basis

that the prosecution had failed to show reliance upon the statements made by the Petitioners and further that the second statement designated as a false pretense was a promise to do something in the future and therefore did not qualify under the false pretenses statute. After retiring upon instructions from the Court, the jury returned a verdict of not guilty on the first count but guilty on the conspiracy count.

On a motion for a new trial, Petitioners again argued that their constitutional rights to counsel and due process of law were denied them. On the 18th day of July, 1961, the trial judge denied the motion and sentenced Petitioner DeGillio to pay a fine of $7,500 within 48 hours, to pay costs of $900 in one week, to spend thirty days in jail, and then to be placed on four years probation. At the same time, the trial judge sentenced Petitioner Milton Silverman to be imprisoned in Jackson Prison, for not less than four and a half, and not more than five years. Thereafter, within the thirty day period in which the Petitioner DeGillio was incarcerated, the trial judge revoked his probation on the ground that he had not paid the $7500 fine within 48 hours, nor had he paid the costs of $900 within one week, and at that time sentenced the Petitioner DeGillio to be imprisoned in Jackson Prison for not less than two and a half and not more than three years.

The Petitioners sought leave to appeal to the Supreme Court of Michigan. Their application was denied on the 8th day of August, 1961, without opinion, and on re-hearing, the denial was affirmed on the 21st day of September, 1961, without opinion. Petitioners then sought review by certiorari to this Honorable Court and the Petition was denied on the 22nd day of January, 1962, with Mr. Justice

Black, Mr. Justice Douglas, and Mr. Justice Brennan, noting that they were of the opinion that certiorari should be granted. The Petitioners then filed a delayed motion for a new trial in the Circuit Court for the County of Genesee, pursuant to the Michigan post-conviction Remedies. The trial judge denied the delayed motion for a new trial on the merits of the same on the 12th day of December.

The Petitioners then sought leave to appeal from this order in the Michigan Supreme Court and leave was denied on April 10, 1963. From this denial, Petitioners seek review by this Court.

REASONS RELIED ON THE ALLOWANCE OF THE WRIT

1. The Supreme Court of Michigan has without opinion refused to review the denial of the petitioners' delayed motion for a new trial, although they assert that they were denied their constitutional right to counsel at the time of the Preliminary Examination. When the Preliminary Examination was scheduled for hearing, the Petitioners had retained Albert A. Goldfarb, an attorney at law practicing in the State of Michigan, to represent them at said Preliminary Hearing. However, as the date for the Preliminary Examination drew near, it became apparent that Albert A. Goldfarb would not be finished with a lengthy jury trial which he was then conducting in the United States District Court for the Eastern District of Michigan, Southern Division, City of Detroit, State of Michigan. Albert A. Goldfarb then contacted the prosecuting attorney, for the County of Genesee and informed him that he was conducting said trial and requested a one day continuance to enable him to get to Genesee County to represent the Petitioners. The Prosecuting Attorney then informed Mr. Albert A. Goldfarb that he would have no objection to such a continuance if the judge would agree to it. When the

Petitioners appeared in Court, without counsel, and requested a one day continuance in order to permit their counsel, who was unavoidably detained, to appear, the Court arbitrarily refused to grant the continuance, stating:

> "Counsel or no counsel, as far as I am concerned, the case will proceed as scheduled."

The refusal of the Court to grant a one day continuance was an abuse of discretion and resulted in a denial of the Petitioners' constitutional right to have the assistance of counsel at the Preliminary Examination.

The Michigan Law respecting Petitioners' right to counsel at the Preliminary Examination is very clear. A Michigan Statute (Comp. Laws, Supp. 1948, Sec. 775.16, Mich. Stat. Ann. Supp. Sec. 28.1253 (1957)) states that when a person is charged with a crime and is unable to procure counsel, the Presiding Judge, at state expense, shall appoint counsel to conduct the Preliminary Examination as well as the trial. Furthermore, the Attorney-General of the State of Michigan in Op. Atty. Gen. 1957, No. 3133, stated that the foregoing statute must be construed to effectuate the policy expounded in *Carter* vs. *Illinois*, 329 U. S. 173 (1946), which held that an accused may require the assistance of counsel at each stage of the prosecution from arraignment to sentencing. See also *Hamilton* vs. *Alabama*, 368 U. S. 52, (1961).

Furthermore, in *Gideon* vs. *Wainwright*, 31 Law Week, 4281, (1963), this Court held that the Sixth Amendment provision that an accused shall have the assistance of counsel is applicable to the states through the Fourteenth Amendment. This Court said:

> "Lawyers to prosecute are everywhere deemed

> essential to protect the public's interest in an orderly society. Similarily, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defense. That government hires lawyers to prosecute and defendants who have money hire lawyers to defend, are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in other countries but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safe guards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

Although this case deals with the rights of an indigent defendant, the principles set forth therein are equally applicable to one who can afford to retain counsel and who has retained counsel but is arbitrarily denied the assistance of counsel by the refusal of the Court to make an allowance to enable his counsel to appear. This also was recognized by this Court in *Chandler* vs. *Fretag*, 348 U. S. 3, (1954) in which this Court said:

> "'Petitioners did not ask the Trial Court to furnish him counsel, rather, he asked for a continuance so that he could obtain his own. This distinction is well established in this Court's decisions. (Citing cases). Regardless of whether Petitioner would have been entitled to appointed counsel, his right to be heard through his own counsel was unqualified."

It is well established by the decisions in this Court as well as decisions in other state courts that the constitutional right to counsel is not limited to the actual trial but

extends throughout the preliminary proceedings. In *Powell* vs. *Alabama*, 287 U. S. 68, Mr. Justice Sutherland, speaking for the Court said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (Emphasis added)

The statement of Justice Sutherland in *Powell* vs. *Alabama* was reaffirmed by the majority of this Court in March of 1963, in *Gideon* vs. *Wainwright*, *supra*. See also *Reece* vs. *Georgia*, 305 U. S. 85; *Moore* vs. *Michigan*, 78 S. Ct. 191.

In *Lambue* vs. *Kaiser*, 176 S.W. 2d, 494, the Supreme Court of the State of Missouri said:

> "The Sixth Amendment of the Federal Constitution and Section 22 of Article II of our Constitution both guarantee the accused the right of counsel, in criminal prosecutions. Under either of these provisions, there can be no doubt that an accused at a preliminary examination is entitled to be represented by counsel if he wishes. An opportunity to counsel must not be denied him."

In *Johnson* vs. *Zerbst*, 304 U. S. 458, this Court said:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdiction prerequisite to a Federal Court's authority to deprive an accused of his right or his liberty . . . If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty . . . The judgment of conviction pronounced by a Court without jurisdiction is void, and one imprisoned thereunder may attain release by habeas corpus."

In a case very similar to the case at bar the California Supreme Court, in *People* vs. *Naphaly*, 105 Cal. 641, 39 P. 29 (1895), reversed the conviction of the accused and ordered a new trial. In that case, the accused was an attorney or had at least some legal training. He knew of his right to counsel, and, in fact, he demanded counsel. He requested a continuance to permit him to obtain counsel at the Preliminary Examination and the Court rejected his request. On reversing the conviction the California Supreme Court said that although the Defendant knew that he had a right to counsel, and therefore was not entitled to have the Court inform him of this right, it was still a denial of a constitutional right to refuse to give him a continuance to permit him to procure counsel. They said:

> "Whatever the Rule may have been at Common Law, under our law every person accused of a felony is entitled to the aid of counsel, whether imprisoned or admitted to bail, and a refusal of an opportunity to procure such counsel amounts to the deprivation of an important right, essential to his safety."

The authority of a magistrate to grant a continuance of a Preliminary Examination is discretionary. But when the exercise of this discretion operates to deprive the Petitioners of a fundamental constitutional right without their consent, then the duty of the Court to protect the constitutional rights of those who stand accused before it must control the exercise of sound discretion. If the discretion is exercised in such a way as to deny the constitutional right, then it is abused. The Genesee County Circuit Court indicated in its opinion on the motion to quash the information that it is the Court and not the counsel that controls the docket. No one denies that the power to determine when cases should be heard rests with the Court and the Court alone. The request of the Defendants indicates a recognition of that power. However, when the docket rules become so inflexible and so rigid that their application deprives an accused in a criminal case of a basic constitutional right, then this rigidity must be tempered with justice and fairness. *Avirgild* vs. *United States*, 255 U. S. 298, (1921); *Gianci* vs. *United States*, 297 Fed. 60 (2d. Cir. 1923).

If the Genesee County Circuit Court was angry because of an upset in its docket, its wrath should have been loosed on counsel and not on the hapless Petitioners who found themselves in such a predicament through no fault of their own and were making the most reasonable request under the circumstances. The situation in this case was an unavoidable circumstance caused by an honest miscalculation of the length of time a trial in a Federal Court in another county would last. Therefore, the magistrates discretion was abused, and the denial of the Petitioners right to counsel raised a jurisdictional bar to the power of the magistrate to bind the defendants over to the Circuit Court for

trial. Therefore, the Circuit Court never acquired jurisdiction to try the Petitioners.

The Petitioners respectfully submit that the issue raised in this appeal as to the extent of the right to retained counsel at a Preliminary Examination is one which is basic and fundamental to the administration of criminal justice throughout the United States. Therefore they respectfully request that this Honorable Court grant the foregoing Petition for Certiorari to decide this issue.

2. Petitioners respectfully submit that they were denied due process of law in that their trial was rendered prejudicially unfair by the admission into evidence of certain stenographically recorded statements in which the prosecuting authorities made statements to the effect that the Petitioner Silverman had a prior criminal record, that they believed the Petitioner DeGilbo to be guilty of the crime of which he was charged and in which the Petitioners repeatedly insisted upon their right to counsel, making no other statements or admissions.

In the first instance, Petitioners were not afforded counsel although they insisted upon their right to counsel at the time of their arrest. For the reasons herein before set forth Petitioners respectfully submit that the denial of their right to counsel infected the recorded statements with such a degree of unfairness as to deny them due process of law.

Secondly, the purported statements which are attached hereto in Appendix ( ) were admitted into evidence over the objection of Petitioners. The entire content of these statements consisted of the Petitioners insistence upon seeing counsel before making any statement to the

prosecuting authorities. If an attorney had been present at the time the prosecutor was questioning the defendants, there can be no doubt that he could have protected the defendants against the insidious insinuations made by the prosecutor that the defendants had a criminal record and that the prosecutor believed them to be criminals. Not having been represented by counsel, the defendants did not have the ability to perceive the motive of the prosecutor in making these statements in the form of questions, and thus could not protect themselves against him.

The fact that a person who is in the custody of law enforcement officials has a constitutional right to the assistance of counsel at that time, was stated with crystal clarity in *People* vs. *Cavanaugh*, 243 Mich. 680, 225 N. W. 510 (1929). The Michigan Supreme Court therein stated:

> "In this State a parent may not be denied the right to see and have conversation with a child in jail and accused of crime. Nor may police having custody of one accused of crime deny an attorney employed by or in behalf of his prisoner the right to see and advise the accused . . . An accused may be apprehended and held in safe custody to answer an accusation in Court, but the custodian of his person possesses no inquisatorial power to hold him incommunicable to parent and counsel. This is a subtle and insidious method of intimidation and cowing, tends to render a person plastic to police assertiveness and demands, and is a trial of mental endurance . . . "

These purported statements should not have been admitted into evidence for several reasons. In the first place, the information contained therein was totally irrelevant. Questions which the prosecutor asked the defendants at the time of their arrest have no relevance to the guilt or inno-

cence of the Petitioners. Furthermore, these so-called "statements" are not admissions against interest since neither of the defendants made any admissions other than their respective names and addresses. They are only the recorded hearsay assertions of the prosecutor, and as such, they are inadmissible. The incurable prejudice resulting to the Petitioners from these statements did not flow from any admissions they made; the damaging and prejudicial contents of these statements was the prosecutor's assertions that he personally believed that DeGillio was a criminal, and his indirect testimony that Silverman had been convicted of a crime in Federal Court and was presently on probation. The nature of this crime was not revealed and Silverman did not testify in his own behalf so that his character was never an issue in the trial. The other prejudice resulted from the fact that the jury was permitted to be apprised that the Petitioners would not make a statement without the assistance of counsel and were therefore permitted to infer that the Petitioners had a consciousness of guilt.

It has been held on several occasions that it is prejudicial error of a nature that renders the entire trial unfair when the prosecuting attorney is permitted to assert in his argument to the jury that he personally believes an accused person is guilty. Because the prosecutor is a respected official charged with protecting the public, the jurors may be prone to give his statement more weight and credence than they would give to an ordinary character witness' belief in the defendants' guilt or innocence. In the instant case, the prejudice is relatively easy to illustrate because the jury was directed to return with a verdict of not guilty as to count one and when they returned they returned with a verdict of guilty as charged and had to be again in-

structed to change their verdict to not guilty as to count one. This clearly illustrates that they were motivated by their emotions and prejudices, and not guided by the evidence and the instructions from the Court. In *People* vs. *Di Paolo*, 366 Mich. 394, 396, (1962), the Michigan Supreme Court, in reversing the conviction of the defendant, said:

> "No attempt was made by the people to establish that Di Paolo had in fact been convicted of the crime of rape in the State of Pennsylvania. The question asked, coupled with the reference in the police records, was well calculated to cause the jury to conclude that such conviction had occurred and that the police record showed such to be the fact. The jury might have concluded from the questions of the prosecuting attorney and the subsequent repetition thereof that appellant was falsifying with reference to the commission of a very serious crime in another state . . . The conclusion may not be avoided that the question asked and repeated with reference to the police records constituted prejudicial error, requiring the reversal of the conviction and the granting of a new trial.

In the case of bar, the defendant Silverman did not even open himself up to the type of questions which the prosecutor asked because he never took the witness stand. Yet the prosecutor, by innuendo, was able to cause the jury to conclude that he had been tried and convicted of a crime in the Federal Court, which had never been proven.

In *Wright* vs. *State*, 325 P. 2d. 1089, the Oklahoma Criminal Court of Appeals denounced a reference to the criminal record of a defendant in the following words:

> "It is of such universal recognition that elaborating seems useless to recite again that to place a defendants' character or reputation in issue before it

becomes an element of the trial, is error *of the worst type*. Evidence relative to previous conviction, with the exception of those alleged in the information, is permitted for one purpose and one only, and that is to effect the credibility of the witness . . . And where the defendant did not present himself as a witness nor present testimony of good character, it is forbidden." (Emphasis added)

Furthermore, the admission of these statements was calculated to indicate a consciousness of guilt on the part of the Petitioners because they insisted upon seeing counsel. This is inherently unfair to the Petitioners since it, in fact, makes the insistence upon a constitutional right substantive evidence of guilt. In *People* vs. *Biancalli*, 9 N. Y. 2d 468, 174 N.E. 2d, 717, the Court of Appeals of New York said:

"On the trial, the people were allowed to show as part of their case that during the police interrogation immediately after arrest, the defendant either had refused to answer a series of incriminating questions, or had remained mute as well, as having insisted upon consulting counsel. This showing was not confined to an isolated instance or an inadvertent improper question that under certain circumstances might well be overlooked as not affecting a substantial right of a defendant, but on the contrary, was part of a persistent repeated course of conduct which may not be overlooked. The defendants' numerous objections were overruled and their motions for a mistrial denied with variously worded rulings to the general effect that questions were not evidence and that whether or not anyone said anything under certain circumstances, was something for the jury to consider.

Persistent and repeated introduction of evidence of this type, for what ever purpose, cannot help but

have the effect of imprinting in the mind of the jury the impression that defendants refusal to answer were so inconsistent with innocence as to amount to admissions of guilt." (Emphasis supplied)

See also *Kelley vs. United States*, 90 U. S. App. D. C. 1 326 F. 2d 246 (D. C. Cir.).

The Petitioners respectfully submit that the admission of these statements to show a consciousness of guilt imposes an undue restriction on the constitutional right to counsel, and makes it so hazardous to invoke this right as to, in effect, abridge it completely. The Petitioners respectfully request that this Honorable Court issue a Writ of Certiorari to review this question so as to define the restrictions which a state may place upon the assertion of a Federal constitutional right. The Petitioners respectfully submit that the introduction of these statements coupled with the stated belief of the prosecutor that the Petitioner DeGillio was a criminal, the indirect testimony of the prosecutor that Silverman had a criminal record, and the inferance of a consciousness of guilt so infected the trial with prejudice as to deny the Petitioners the due process of law to which they are entitled under the Fourteenth Amendment of the United States Constitution.

3. Petitioners herein were acquitted of the substantive count of obtaining property under false pretenses by direction of the Court, and were convicted of conspiracy to obtain property under false pretenses. The Petitioners respectfully submit that this holding is inconsistent with the law of Michigan and does not state a crime. The conspiracy count was obviously used as a dragnet in the event that the substantive proof should fail. This Court has on several occasions condemned the attempts to broaden the

conspiracy prosecutions to ensnare persons who are not guilty of any substantive crime.

The Constitution of the United States and the Constitution of the State of Michigan of 1908, Article II, Sec. 10 guarantees to every person accused of a crime the right to be informed of the nature of the charges against him. This constitutional right is further entrenched in Michigan law by statute and case authority. The Information in this case charges the defendants with obtaining property under false pretenses and conspiracy to obtain property under false pretenses. The trial judge in directing the verdict on the first count of the information found that of the three alleged representations made by the Petitioners, the second was a future promise which could not be a false pretense.

In order to have a conspiracy there must be an agreement to either commit an unlawful act or to commit a lawful act by unlawful means. There was no question in this case that the act which the Petitioners were alleged to have committed, buying equities in real estate, is a lawful act. The question therefore is whether or not there were any unlawful means utilized by the Petitioners. In the Information the prosecuting authorities set forth three alleged representations which were purported to have been the false pretenses or unlawful means utilized by the Petitioners. The first of said representations was a statement to the effect that Petitioner DeGillio was a Teamster Steward earning $176 per week. The second was that Mr. DeGillio intended to live in the home after he bought it and the third is that Mr. DeGillio would assume the liability on the outstanding mortgage against the home. The first of these representations was proven by the prosecuting authorities and by the defendants to have been true at the time it was made, in that

the Petitioner DeGillio was a Teamster Steward on withdrawal, and that the Teamster agent had told him that he was being transferred to Grand Blanc which is just outside the town where this crime was to have been committed and that he would be earning in the neighborhood of $176 per week. Therefore this alleged representation would not be a false pretense. It was not a misrepresentation of an existing fact, at least insofar as the Petitioner DeGillio understood the situation at the time that this representation was made. As to the second alleged misrepresentation, the trial judge ruled that as a matter of law this could not be a false pretense. It was a promise to do something in the future and was not a misrepresentation of an existing fact. The third representation as to the assumption of liability on the outstanding mortgage was held to be a false pretense. However, Petitioners respectfully submit that this alleged representation is, if anything, a representation as to a matter of law and not as to a matter of fact. Furthermore, the representation was true under the law of the state of Michigan which affects the property in question. Although the deed in question read "subject to the mortgage," the Michigan law permits parol proof to indicate an agreement to assume a mortgage. The legal status of the Petitioners, the Lavracks and the mortgage company and its assigns, was the same at the consummation of the agreement as the Petitioners represented it would be. In 37 Am. Jur. Mortgages, Sec. 393, P. 324, it is stated:

> "An agreement of assumption of a mortgage debt by the grantee of the mortgage premises may be wholly outside the conveyance. Indeed, although there is some authority to the contrary, even an oral proposition of an assumption made to the grantor at the time of the conveyance, is generally held to be sufficient."

This is the rule as recognized by the Michigan Supreme Court throughout Michigan's judicial history. In *Canfield* vs. *Shear*, 49 Mich. 313, (1882), Justice Cooley, speaking for the majority of the Michigan Supreme Court, said that where there is a verbal agreement to assume the mortgage and payment is made consistent with an assumption, then as between the purchaser and the mortgagor, the purchaser will be treated as though he had assumed the mortgage, even if the deed expressly says that the property was taken subject to the mortgage. This statement was reaffirmed in a line of cases dating from that time until recent years and has never been changed. (See also *Swarthough* vs. *Shields*, 265 Mich. 427 (1915); *Duncan* vs. *Kirker*, 332 Mich. 353 (1930).

There are therefore, no unlawful means stated in the Information which as a matter of law constitute false pretenses so as to render the Petitioners criminally liable under a conspiracy charge. In *Alderman* vs. *People*, 4 Mich. 414, (1857), the Michigan Supreme Court said:

> "If the combination be to do an act, not in itself unlawful but which it is agreed to accomplish by criminal or unlawful means, then those means must be particularly set forth, and be such as to constitute an offense, either at common law or by statute."

In *People* vs. *Barkelow*, 37 Mich. 433, (1877) the Michigan Supreme Court recognized the injustice in a situation such as that presented at bar in which it said:

> "There is no class of cases where defendants are better entitled to protection of the law against vague charges then where they are charged with conspiracy. The course of legal experience has shown this to have been a familiar resort to catch innocent persons, by throwing a dragnet of vague charges, and

resorting to suspicions and prejudices to induce juries to convict persons who find it impossible to escape the malicious insinuations of false accusers . . .

The facts in the present case are not such as to show the injustice of the strict rule. The defendants certainly do not appear in an enviable light, and are probably dishonest swindlers but this does not render them responsible for crimes not charged and proved against them. The proof is very slender if there is any proof that they obtained money by false pretenses. It indicates that they made promises which they did not mean to keep, and partly by this and partly by flattery and other cunning devices of sharpers induced people to order what they did not want and to trust to their promises not to hold them on such orders. It is not surprising that a jury with such culprits before it should convict them without any close attention to law or facts. But this mode of doing justice is not favored in law, and needs no encouragement.

We think the Information fatally defective so that no judgment can be given upon it. It must be certified to the Circuit Court that no judgment should be entered against the respondent but that judgment should be arrested and the prisoners discharged."

Furthermore, in *Parr* vs. *United States*, 80 S. Ct. 1171, the United States Supreme Court held that where the substantive offense which is charged in the Information fails, a count of conspiracy to commit that offense must also fail. In *Russell* vs. *United States*, 369 U. S. 749 (1962), the United States Supreme Court held that any Information which purported to charge a crime by quoting the words of the relevant statute, was insufficient as a matter of law unless it also set forth the particular activities or statements by the defendants which constituted a violation of the statute.

Thus the Petitioners respectfully submit that the convic-

tion in this case was a denial of due process of law since the Information was unconstitutionally vague and indefinite. By failing to set forth any means which could be construed to have been unlawful in the light of existing law of the state in which the crime was committed, the Information did not adequately apprise the Petitioners of the nature of the charges against them and thus the Information should be quashed and they should be discharged from custody.

RELIEF

Wherefore, your Petitioners respectfully pray that this Honorable Court grant a Writ of Certiorari directed to the Supreme Court of the State of Michigan requiring that Court to certify a full and complete transcript of its record in the above-entitled cause to this Court for its review and determination.

And your Petitioners will ever pray.

ALBERT A. GOLDFARB
Attorney for the Petitioners
2001 Cadillac Tower
Detroit 26, Michigan
WOodward 3-5888

DATED:

CERTIFICATE

I do hereby certify that I am the Attorney for the Petitioners herein, that the allegations of fact contained in the foregoing Petition are true except as to those matters I believe them to be true and that in my opinion the foregoing Petitioners is well founded in law as well as in fact and is not interposed for the purpose of delay.

ALBERT A. GOLDFARB

APPENDIX

CRIMINAL WARRANT

State of Michigan
County of Genesee—ss.

In Municipal Court, before Dale C. Showley, Municipal Judge. To the Sheriff or any Peace Officer of said County, Greetings:

Whereas: Gabrieline Lavrack has made complaint in writing, and on oath, to Dale C. Showley, a Municipal Judge of the City of Flint, in said County, that heretofore, to-wit, between June 9, 1960 and June 13, 1960, at the Township of Mt. Morris, in the County aforesaid,

COUNT I

Fred DeGillio and Milton Silverman, with intent to cheat and defraud one Mark Lavrack and Gabrieline Lavrack and fraudulently to obtain, by conveyance, the interest of the said Mark Lavrack and Gabrieline Lavrack, in and to Lot No. 195, David Berger Subdivision, No. 2, Genesee County, more commonly known as 6159 Penwood Street, Mt. Morris, from them, the said Mark Lavrack and Gabrieline Lavrack, did designedly and falsely represent and pretend that: the said defendant, Fred DeGillio, was a steward in the Teamsters' Union earning One Hundred and Seventy-Six ($176) Dollars per week; and that the said defendant; Milton Silverman, was purchasing said house for the said defendant, Fred DeGillio's personal occupancy; and that the said Mark Lavrack and Gabrieline Lavrack, would be free and clear of any and all liability relating to said property upon Mark Lavrack's and Gabrieline Lavrack's lawful, legal conveyance of title by warranty deed

to said property to the said defendant, Fred DeGillio and that the said Mark Lavrack and Gabrieline Lavrack, believing said false pretenses and representations so made as aforesaid by the said Fred DeGillio and Milton Silverman, was then and there deceived thereby, and was then and there induced by means thereof to deliver; and did then and there deliver the said real estate by conveyance of lawful and legal title thereto to the said Fred DeGillio and Milton Silverman, and the said Fred DeGillio and Milton Silverman, did then and there designedly, by means of false pretenses and representations so made as aforesaid, unlawfully and fraudulently obtain from the said Mark Lavrack and Gabrieline Lavrack, the said real estate, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars, of the goods and property of the said Mark Lavrack and Gabrieline Lavrack, with intent to cheat and defraud them, the said Mark Lavrack and Gabrieline Lavrack, of the same; whereas in truth and in fact the said false pretenses and representations so made as aforesaid and hereinbefore set forth, were utterly false and untrue, all of which was well-known to the defendants, Fred DeGillio and Milton Silverman, at the time of making the same to the said Mark Lavrack and Gabrieline Lavrack.

COUNT II

Fred DeGillio and Milton Silverman, unlawfully, falsely, deceitfully and fraudulently did combine, conspire, confederate, and agree together by divers false pretenses, subtle means and devices to obtain and acquire unto themselves, of and from Mark Lavrack and Gabrieline Lavrack, a conveyance of title to real estate located at 6159 Penwood Street in the Township of Mt. Morris, County of Genesee and also known as Lot. No. 195, David Berger

Subdivision, No. 2, Genesee County, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars, of the property of them, the said Mark Lavrack and Gabrieline Lavrack, and to cheat and defraud them, the said Mark Lavrack and Gabrieline Lavrack, thereof, to the great damage of them, the said Mark Lavrack and Gabrieline Lavrack.

In the Name of the People of the State of Michigan, you and each of you, are hereby commanded forthwith to arrest the said Fred Bernard DeGillio and Milton Silverman and bring them before me, to be dealt with according to law.

Given under my hand and seal, at the City of Flint, in said County, on the 19th day of January, A.D. 1961.

/s Dale C. Showley,
Municipal Judge.

EXHIBIT 3

STATEMENT OF MILTON SILVERMAN

Stenographic record of a conversation had between Mr. Robert F. Leonard and Mr. Milton Silverman, in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, at 6:10 o'clock p. m.

Present: Mr. Robert F. Leonard, Det. Edward Mongeon, Virginia Bertelsen, Court Reporter.

(Questions by Mr. Leonard and answers by Mr. Silverman:)

Mr. Leonard: Mr. Silverman, this is Virginia Bertelsen. She will take down what we say here. She is a stenographer.

Mr. Silverman: I will answer no questions when the machine is going.

Q. What is that?

A. I will answer no questions when the machine is going.

Q. You won't?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan. I have nothing more to say.

Q. Let me ask this, Mr. Silverman,—what kind of work are you in?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. And are you associated with anybody?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Have you been arrested before?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. You know anybody by the name of "Lavrack"?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan. You're wasting a lot of time.

Q. The machine is telling us a lot. Are you married?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Do you have any children?

A. I want to talk to my lawyer.

Q. Did you forget your name?

A. I want to speak to an attorney; I want to make a 'phone call.

Q. You will get a chance to do that.

A. I waited an hour and half now. I haven't made a phone call yet. I have been in custody an hour and a half.

Q. You will get to make the phone call when we say you can.

A. I understand that, nothing new, I am incarcerated.

Q. That's right. All right, now, how long have you been buying real estate?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Have you been arrested before?

A. I will answer no questions when the machine is going.

Q. Are you on Federal probation now?

A. I will answer no questions when the machine is going.

Q. Are you on Federal probation?

A. I live at 13241 Dartmouth, Oak Park, Michigan.

Mr. Leonard: O. K.

(To the reporter): That is all.

(Statement concluded at 6:15 o'clock p. m.)

State of Michigan,
County of Genesee—ss.

I, Virginia Bertelsen, do hereby certify that I reported stenographically a conversation had between Mr. Robert F. Leonard and Mr. Milton Silverman in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, and that the foregoing and attached three pages constitute a full and correct transcript of the stenograph notes taken by me of said conversation.

Virginia Bertelsen,
Court Reporter.

Flint, Michigan
January 24, 1961.

EXHIBIT 4

STATEMENT OF FRED BERNARD DeGILLIO

Stenographic record of a conversation had between Mr. Robert F. Leonard and Mr. Fred Bernard DeGillio, in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, at 5:10 o'clock p.m.

Present: Mr. Robert F. Leonard, Assistant Prosecuting Attorney, Det. Edward Mongeon, Virginia Bertelsen, Court Reporter.

(Questions by Mr. Leonard and answers by Mr. DeGillio, unless otherwise indicated.)

Mr. Leonard: Mr. DeGillio—

A. Yes, sir.

Mr. Leonard: This is Miss Bertelsen, and what we say will be taken down by her. We want to ask you some questions about a particular incident, and we would like you to answer them truthfully, if you would.

Q. What is your full name?

A. Fred Bernard DeGillio.

Q. Where do you live, Fred?

A. 202 Rush Street, Garden City, Michigan.

Q. How old are you?

A. I am forty-four years old. I think that's right, let's see,—about forty-five; I will be forty-five, come in May.

Q. What is your occupation?

A. I am an investor.

Q. How long have you been in this investment line?

A. Approximately three years, two or three years.

Q. Are you married?

A. Yes, sir.

Q. You have any children?

A. Yes, sir.

Q. How many children do you have?

A. Three.

Q. I'm sorry,—did you say you live in Garden City?

A. That's right.

Q. And are you in partnership or anything with anybody, or association?

A. Let me say something here. I prefer not answering any more questions. I think I am entitled to an attorney. I have asked this gentleman here, and he says I was. Now, I would like to have an attorney. I don't know where I am going or what is happening here. I don't even know why I was picked up. Now, they said I was picked up on a—some kind of a charge. I don't know what it is. I prefer to have an attorney. I have given my name and address, and I think I am entitled to an ottorney.

Q. Well, you are entitled to an attorney, Mr. DeGillio, but we are entitled, as law enforcement officers, also to question you.

A. You can question me, sir. I don't want no argument.

Q. Now, are you a member of the Teamsters Union?

A. I am not a member now; I am an inactive member. I have been a member in the Teamsters Union. If you don't mind I prefer not answering any more questions.

Q. What is your Local?

A. What is my what?

Q. Your local?

A. Local what?

Q. Union.

A. My local Union?

Q. Yes. You say you were a member, or you are an inactive member. I want to know what your Local is.

A. I am not an active member of the Teamsters Local.

Q. Did you have a Local when you were active?

A. I prefer not answering any more questions, sir, please.

Q. Do you know any people by the name of Lavrack, Mark and Gabrielene Lavrack, that lived at 6759 Penwood Street in the Township of Mt. Morris, in Genesee County?

A. I have heard the name, but I don't recall them.

Q. You don't recall them?

A. Not offhand, no, sir.

Q. Have you ever told any of these people that, or these people you dealt with on these houses that you were a member of the Teamsters Union?

A. I prefer not answering any more questions, sir.

Q. Have you ever told them how much you make a week, these same people; have you ever told them that?

A. I prefer not answering the question.

Q. Do you have any other occupation besides [illegible] called investment business?

A. No, sir, no other occupation.

Q. How often do you come to Flint or Genesee County in a week?

A. A couple times.

Q. Where are your offices located?

A. I have no office, sir.

Q. What type of investments do you make?

A. I prefer not answering any more questions. I want to see a lawyer.

Q. Do you deal in real estate?

A. I prefer not answering questions.

Q. Mr. DeGillio, you are being, or you have been arrested for the crime of obtaining property under false pretenses, as well as conspiracy to obtain property under false pretenses; in particular, you are charged with obtaining the property of one Mark and Gabrielene Lavrack, real

estate property located at 6159 Penwood Street in the Township of Mt. Morris, County of Genesee, on or about the 15th day of June, 1960.

Now, that you know what it is all about, do you recall the people in question?

A. I appreciate you telling me what I was picked up for, arrested for, and I decline answering any more questions without an attorney. Now, I have that right, I do think.

Q. You apparently haven't heard me. I said we have a right to investigate a case. We have a right to question witnesses.

A. You're arresting me; I can't stop you from arresting me.

Q. That is exactly right.

A. I can't argue the point. They picked me up off the street like a criminal.

Q. There is a question, isn't there, Mr. DeGillio, that you may be a criminal. We think you are; that is why we issued a warrant.

A. That is fine. Then I am entitled to go to court on this.

Q. That's right.

A. To find out if I am a criminal.

Q. We are entitled to investigate a case.

A. All right, investigate it.

Q. And we are right now, and that entitles us to ask you questions.

A. Ask me the questions.

Q. What do your investments include, Mr. DeGillio?

A. I assure you, sir, I am entitled to an attorney, and I'd like to speak with an attorney. I am not answering any more questions. If you want to book me, you can book me.

Do what you like with me, but I am—I decline to answer any questions.

Q. Have you been arrested before?

A. I am entitled—no, sir. I have not been arrested before.

Q. You never have?

A. Never have. I don't know what is going on. I have never been arrested before, but I do know I am entitled, as a citizen entitled to an attorney. This I am entitled to. If I am not entitled to an attorney, I can't help you out. Then I don't know what I am entitled to. You're charging me with a serious charge here.

Q. That's right.

A. I think I am entitled to an attorney. It is a very serious charge.

Q. That's right.

A. So I am entitled to an attorney. I'd like to speak to him.

Mr. Leonard: You will get that opportunity.

(To the reporter: That is all.

(Statement concluded at 5:20 o'clock p. m.)

State of Michigan,
County of Genesee—ss.

I, Virginia Bertelsen, do hereby certify that I reported stenographically a conversation had between Mr. Robert F. Leonard and Mr. Fred Bernard DeGillio, in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, and the foregoing and attached seven pages constitute a full and correct transcript of the stenograph notes taken by me of said conversation.

Virginia Bertelsen,
Court Reporter.

Flint, Michigan,
January 24, 1961.

EXCERPT FROM PRELIMINARY EXAMINATION

Flint, Michigan,
Wednesday, February 15, 1961.

Mr. Leonard: If the Court please, this is in the matter of the People of the State of Michigan v. Fred DeGillio and Milton Silverman. The People are ready to proceed, your Honor. I understand the defendants are in court.

The Court: Want to take chairs up there?

Respondent Silverman: Your Honor, can I see the file?

The Court: Sure. You've got a copy of it.

Respondent Silverman: The papers were delivered, your Honor. As far as the record—as far as the motions are concerned, the complete file; this is only the copy of the complaint, your Honor.

The Court: The warrant's right there, too.

Respondent Silverman: I am looking for the complete file. Can I see it, your Honor.

The Court: That's all. There's the warrant.

Respondent Silverman: Your Honor, as I recollect you told me in open court he would put the letter I delivered to him—

The Court: The letter's right there.

Respondent Silverman: So it is, your Honor.

Judge Baker, I delivered to the Court and your Honor personally Tuesday, February 14, 1961 a copy of this letter to your Honor.

The Court: The Court is well aware of that.

Respondent Silverman: A letter from my attorney, Mr. Al Goldfarb stating that he is trying a criminal case in Federal Court, Eastern District, Detroit, Michigan, in Judge Freeman's courtroom, where he asked the Judge for the case to be postponed one day until Thursday, Feb-

ruary 16, 1961. I paid my attorney Albert Goldfarb for his services as my legal counsel and I want him to appear in my behalf and I want a stay in proceedings until he can appear in my behalf. I am unable to get another lawyer in such short notice.

I called Mr. Samuel N. Rubin from your Honor's office yesterday and I reached Mr. Samuel N. Rubin in the court house in Detroit. I was unable to reach Mr. Goldfarb, he was trying a case in front of a jury in Judge Freeman's Court. And I went to Mr. Rubin at 4:30 yesterday afternoon and he told me that he couldn't appear in such a short notice to try the case properly. And, in fact, as of this morning he had a Circuit Court matter in Judge Callahan's courtroom for Wednesday morning, this morning, in Detroit in Circuit Court.

Our rights are in jeopardy by me not having proper counsel and ask the Court to be adjourned until tomorrow morning. I believe the case in front of the Federal jury will be over. In fact, I will ask your Honor to call Judge Freeman's court. I have a credit card and I will pay for the call to verify he was trying a criminal matter in front of a jury, which he started previously, the case started.

Yesterday he talked to Mr. Leonard on the 'phone and stated the case might run an extra day. In fact, yesterday, prior to delivering the letter to your Honor I delivered a letter to Mr. Leonard. I asked Mr. Leonard if Thursday was convenient for him, or any other day, preferably. He told me that Thursday would be as preferable to him as of Wednesday, although, he had—he'd have to notify witnesses to appear on Thursday morning. When I walked in the courtroom yesterday afternoon he told me this, he called the Court, that is what the officer in the courtroom

did, and definitely didn't want a postponement for Thursday.

Mr. Leonard: If the Court please, this matter has been pending since January 19th; at the request of the defense counsel we agreed to an adjournment until this particular date, the reason being that apparently his counsel has been tied up in court in Detroit.

First, that Mr. Silverman indicated that Mr. Goldfarb or Goldfab talked to me regarding the adjournment until today, that's not true at all. I never talked to him on the telephone about an adjournment until today. This letter indicates that he attempted to get ahold of me.

Second, I never told—

Respondent Silverman: That is not right.

Mr. Leonard: Just a minute.

The Court: Just a minute.

Mr. Leonard: Secondly, Mr. Silverman is not correct when he says I told him today would be all right with me. My statement was that if the Judge agrees with that I would have no argument against it. However, I have issued or had subpoenas issued for these witnesses, they have been subpoenaed, and it would be difficult to call them off. Now, we have subpoenaed eight or ten witnesses, your Honor, and they are present in court and we are ready to proceed.

The Court: I think that there's one thing that's been overlooked here, too. In the first place, both respondents were represented by Mr. Goldberg and then substitution of attorneys was made and there was a request then for an adjournment and I wasn't going to adjourn the case then, I saw no reason for it; and the only reason it was adjourned last time was on the request of the Prosecuting Attorney that there be an adjournment. As I understand

it, it was definitely understood that there would be no further adjournment, and that Mr. Goldfarb had his business in such a condition that he would be able to be here and represent him. If he didn't, that's too bad, as far as I am concerned. Counsel or no counsel, as far as I am concerned, the case will proceed as scheduled.

Respondent Silverman: Your Honor—

The Court: You sit down.

Respondent Silverman: I can't answer—

The Court: You can sit down.

Respondent DeGillio: Judge Baker, your Honor, my attorney has informed this Court that he could not appear here today because he is in Federal Court today in front of Judge Freeman.

The Court: He knew that when he made—

Respondent DeGillio: I have paid my attorney—

The Court. You just sit down and we'll go ahead with it.

Mr. Leonard: Gabrieline Lavrack, want to come up here, please.

INFORMATION—GENERAL

State of Michigan

The Circuit Court for the County of Genesee

Walter P. Kuta, Prosecuting Attorney for said County, for and in behalf of the people of the State of Michigan, comes into said Court, in the February A.D. 1961 term thereof, and gives it hereof to understand and be informed that Fred Bernard DeGillio and Milton Silverman heretofore, to wit on or about the 9th day of June in the year one thousand nine hundred and sixty at the Township of Mt. Morris in said Genesee County,

COUNT I

between that date and June 13, A.D., 1960, with intent to cheat and defraud one Mark Lavrack and Gabrieline Lavrack and fraudulently to obtain, by conveyance, the interest of the said Mark Lavrack and Gabrieline Lavrack, in and to Lot No. 195, David Berger Subdivision, No. Two (2) Genesee County, more commonly known as 6159 Penwood Street, Mt. Morris, from them, the said Mark Lavrack and Gabrieline Lavrack, did designedly and falsely represent and pretend that: the said Defendant, Fred DeGillio, was a steward in the Teamsters' Union earning One Hundred and Seventy-Six ($176) Dollars per week; and that the said Defendant, Milton Silverman, was purchasing said house for the said Defendant, Fred DeGillio's personal occupancy; and that the said Mark Lavrack and Gabrieline Lavrack, would be free and clear of any and all liability relating to said property upon Mark Lavrack's and Gabrieline Lavrack's lawful, legal conveyance of title by warranty deed to said property to the said Defendant, Fred

DeGillio, and that the said Mark Lavrack and Gabrieline Lavrack, believing said false pretenses and representations so made as aforesaid by the said Fred DeGillio and Milton Silverman, was then and there deceived thereby, and was then and there induced by means thereof to deliver, and did then and there deliver the said real estate by conveyance of lawful and legal title thereto to the said Fred DeGillio and Milton Silverman, and the said Fred DeGillio and Milton Silverman, did then and there designedly, by means of false pretenses and representations so made as aforesaid, unlawfully and fraudulently obtain from the said Mark Lavrack and Gabrieline Lavrack, the said real estate, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars, of the goods and property of the said Mark Lavrack and Gabrieline Lavrack, with intent to cheat and defraud them, the said Mark Lavrack and Gabrieline Lavrack, of the same; whereas in truth and in fact the said false pretenses and representations, so made as aforesaid and hereinbefore set forth, were utterly false and untrue, all of which was well known to the said Defendants, Fred DeGillio and Milton Silverman, at the time of making the same to the said Mark Lavrack and Gabrieline Lavrack, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

COUNT II

The said Walter P. Kuta, Prosecuting Attorney, further gives the Court to understand and be informed, that at the time and place aforesaid, the said Fred DeGillio and Milton Silverman unlawfully, falsely, deceitfully and fraudulently did combine, conspire, confederate, and agree together by divers false pretenses, subtle means and devises to obtain

and acquire unto themselves, of and from Mark Lavrack and Gabrieline Lavrack, a conveyance of title to real estate located at 6159 Penwood Street in the Township of Mt. Morris, County of Genesee and also known as Lot No. 195, David Berger Subdivision, No. Two (2), Genesee County, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars, of the property of them, the said Mark Lavrack and Gabrieline Lavrack, thereof, to the great damage of them, the said Mark Lavrack and Gabrieline Lavrack, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

.....

Prosecuting Attorney for
the County of Genesee.

MOTION TO QUASH INFORMATION

Come now the Defendants by Albert A. Goldfarb, their attorney, and move this Court to quash the information filed therein for the following reasons:

1. Because the alleged preliminary examination upon which certain information is based fails to disclose that the Defendants committed any crime.

2. Because at said alleged preliminary examination, the Defendants' rights were violated in a manner repugnant to their rights under the Constitution of the United States and of the Constitution of the State of Michigan, in that they were denied the right to be represented by counsel, in violation of Article VI of the United States Constitution and Article II, Section 19 of the Constitution of the State of Michigan.

3. Because the examining magistrate lacked jurisdiction and said proceedings were conducted in violation of Section 28.922 of the Michigan Statutes Annotated.

4. Without waiving the benefit of the foregoing Motion, Defendants in the alternative, request the Court to remand this cause to the examining magistrate for further hearing so that these Defendants might urge the grounds herein before set forth as a basis for quashing the complaint and warrant.

5. This Motion is based upon the files and records in this cause and upon the affidavit of Albert A. Goldfarb, the attorney for the Defendants.

Albert A. Goldfarb,
Attorney for Defendants,
2001 Cadillac Tower,
Detroit 26, Michigan.

Samuel H. Rubin,
Of Counsel.
Dated: February 18, 1961.

AFFIDAVIT

State of Michigan,
County of Wayne—ss.

Albert A. Goldfarb, a duly licensed attorney, being duly sworn deposes and says, that on January 24, 1961, your deponent contacted Robert F. Leonard, Assistant Prosecuting Attorney for the County of Genesee, City of Flint, State of Michigan, by telephone at the telephone number CEdar 2-9185, and that a conversation ensued between your deponent and the said Robert F. Leonard, relative to an adjournment in the matter of the People of the State of Michigan vs. Fred Bernard DeGillio and Milton Silverman; that during said conversation your deponent informed Mr. Leonard that he sought an adjournment in this particular matter, the preliminary hearing thereof, until some time in March, 1961, due to previous commitments as to trial dates set in the various courts located in the State of Michigan.

Further, your deponent states that previous to this, a copy of your deponent's trial schedule was delivered to Fred Bernard DeGillio, who in turn delivered said schedule to the Honorable Basil B. Baker, Municipal Judge, Flint, Michigan.

Your deponent further states that during the conversation between your deponent and Mr. Robert F. Leonard, Mr. Leonard informed your deponent that he would not consent to an adjournment into the month of March, 1961, whereupon your deponent notified Mr. Leonard as to his schedule, asserting that there was a possibility that he

might be able to conclude a matter scheduled for trial February 9, 1961, before the Honorable Ralph M. Freeman, United States District Judge for the Eastern District of Michigan, by February 15, 1961 or February 16, 1961, whereupon Mr. Leonard informed your deponent that he understood the fact that this deponent's schedule during this period was full.

Your deponent further asserts that during the conversation between your deponent and Mr. Leonard, that your deponent informed Mr. Leonard that he would attempt to arrange his schedule to include the examination in regards to the case of The People of the State of Michigan vs. Fred Bernard DeGillio and Milton Silverman; informing Mr. Leonard that a murder trial was scheduled in the Recorders Court for the City of Detroit in the Case of the People vs. Myron Prewitt, said trial scheduled for February 20, 1961.

Further, your deponent asserts that on February 13, 1961, when it appeared that it was impossible to conclude the matter being tried before the Honorable Ralph M. Freeman, United States District Judge for the Eastern District of Michigan, in the matter of the case of The United States vs. William Henry Hackett, #38429; that prior to the temporarily adjourned date of the preliminary hearing of February 15, 1961, your deponent immediately attempted to call Mr. Robert F. Leonard, Assistant Prosecuting Attorney for Genesee County, State of Michigan, to inform him of the situation, at which time your deponent learned that the office of the prosecuting attorney for Genesee County was closed on that date due to the celebration of Lincoln's birthday.

Your deponent further states that from February 9, 1961 through February 16, 1961, your deponent was en-

gaged in a trial defending William Henry Hackett, as aforesaid, without any delay or adjournment, and that during that period the usual court hours were observed, being that of 9:30 A.M. through 4:30 P.M. or 5:00 P.M. during the period aforementioned.

Further your deponent asserts that a letter was dictated on February 13, 1961, a verifax copy thereof being part and parcel of this Affidavit, to Mr. Robert F. Leonard, requesting a brief adjournment in this particular matter; said letter was delivered to Milton Silverman and upon information and belief, your deponent believes said letter to have been delivered to Mr. Robert F. Leonard, a copy of which was delivered to the Honorable Basil B. Baker, Municipal Judge of Flint, Michigan.

Further deponent sayeth not.

s/ Albert A. Goldfarb.
Albert A. Goldfarb.

Subscribed and sworn to before me this ..... day of February, 1961.

s/ .....
Notary Public, Wayne County, Michigan.
My commission expires: .....

ALBERT A. GOLDFARB
Attorney at Law
~~2001-2~~5 Cadillac Tower
Detroit 26, Michigan

Mr. Robert E. Leonard, February 13, 1961.
Assistant Prosecuting Attorney
for Genesee County,
Courthouse Building,
Flint, Michigan.

Dear Mr. Leonard:

I attempted to telephone you this morning, relative to an adjournment of one day, Re: The People of the State of Michigan v. Milton Silverman and Fred DeGillio, but as you know, today seems to be a belated celebration of Lincoln's birthday.

I am now in trial in the United States District Court for the Eastern District of Michigan, in the case of U. S. v. William Henry Hackett, No. 38420, before the Hon. Ralph M. Freeman, United States District Judge of the Eastern District of Michigan. There have been certain circumstances which have taken place during this trial which have caused it to go beyond the time originally anticipated. It appears, however, that the matter should be concluded by Wednesday afternoon, therefore permitting me to be in Genesee County to represent Fred DeGillio, in the matter pending in Genesee County.

I would appreciate your extending to me this one day of grace.

Very truly yours,
Albert A. Goldfarb

AAG:cdb
cc: Judge Basil B. Baker,
Municipal Judge,
Flint, Michigan.

OPINION ON RESPONDENT'S MOTION TO QUASH INFORMATION AND REMAND TO MUNICIPAL COURT

Respondents have moved to Quash the Information herein urging two grounds. The first ground being a lack of evidence of any crime, the second ground alleging denial of the Constitutional right to be represented by Counsel at the Preliminary Examination.

With respect to the first ground, the Court has read the transcript of the testimony taken at the Preliminary Examination and is satisfied sufficient evidence appears therein to warrant the respondents being bound to Circuit Court for trial.

A review of the file indicates the second reason alleged is completely invalid. Respondents did have Counsel who appeared and requested adjournment on January 23, 1961 to February 15, 1961, and waived the ten day provision of the Statute. Counsel then failed to appear for the examination at the February 15th date he had requested.

Representation on Preliminary Examination is permissible not mandatory. *Peo.* v. *Podolski*, 332 Mich. 508. Even if a right to be represented by Counsel at Preliminary Examination did exist, it does not mean the judicial process stops because the Counsel hired failed or refused to appear. Courts still set hearing and trial dates, not defense Counsel. Furthermore, the right to Counsel does not mean the right to any particular lawyer, especially where that lawyer is too busy to handle his clients' affairs or to appear in Court at the date he was requested or agreed to.

Respondent's Motion to Quash the Information and to Remand is hereby denied. Respondents will appear for Arraignment March 13, 1961 at 9:00 A.M.

/s/ Donn D. Parker,
Circuit Judge.

Dated: March 9, A.D. 1961.
A True Copy:
George G. Dunn, Clerk.

EXCERPTS FROM CHARGE OF COURT AS TO EXHIBITS 3 AND 4.

(14) The Court: The Court will charge you as to Exhibits 3 and 4, which are statements of the respondents taken January 18, 1961, that if you find or believe these statements were secured by threats or by force or violence you should not consider them. If you find they were voluntarily given you may consider them in your deliberation.

Mr. Rubin: Your Honor, may I (15) interrupt, please. Would your Honor give me permission to have that request just as I wrote it to go into the record so that at least I would have something there? You see, your Honor hasn't given it as I requested.

The Court: Well, I think—

Mr. Leonard: Could we not do this after the jury is—

Mr. Rubin: I have no objection, but I would like to have it in the record.

The Court: All right, I'll put it in, including the time you gave it to me; but I won't do it in front of the jury.

Mr. Rubin: Yes, I know, sir.

The Court: Will you draw two names out of the box.

(Whereupon two jurors were excused, the Court Officer's oath administered, and at 11:42 a.m. the jury retired to the jury room to deliberate.)

The Court: You wanted to put something on the record.

Mr. Rubin: With the Court's permission, Your Honor, at the close of your charge, asked if we had (16) any further corrections, additions, requests to make in connection therewith, and I handed up to your Honor a request I wrote out in handwriting—oh, I imagine it was around 11:35 or

11:40. What I requested, your Honor, was to charge the jury as follows: "I charge you that statements offered in evidence, taken of the defendants after arrest, cannot be considered by you in this case and you should disregard the statements." And if my memory is correct, those Exhibits are 3 and 4—

Mr. Leonard: People's Exhibits 3 and 4.

The Court: Yes.

Mr. Rubin: People's Exhibits 3 and 4. Since the case is going to the jury strictly on the count of conspiracy as to the defendants, as I understand it, your Honor stated that you will give your own charge—

The Court: Well, the record shows what I stated, and, you just put on the record—

Mr. Rubin: I'm sorry, I'm sorry. Your Honor then gave your own charge in that connection.

The Court: Yes.

Mr. Rubin: Thank you very much.

The Court: All right.

Mr. Rubin: And I would like to be (17) considered on the record before the jury retired, so that it wouldn't appear as if I gave it to you now.

The Court: Yes, you gave it to me right at the end of my charge.

All right.

MOTION IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

Come now the defendants, Fred Bernard DeGillio and Milton Silverman, by Samuel H. Rubin, their attorney, and move this Court for an Order setting aside the verdict of guilty found by the jury in this cause and pray:

First: That the judgment of conviction be arrested.

Second: That this Court direct a verdict of not guilty.

Third: In the alternative, grant a new trial for the following reasons:

1. Because the verdict of the jury is contrary to law in that:

   A. The jury returned a verdict of guilty as charged when as a matter of fact, the Court had directed the jury to find the defendants not guilty on the first count, namely, of obtaining property under false pretenses, and thereupon under the prodding of the Court the jury announced a verdict of not guilty on the first count, and a verdict of guilty on the second count, namely conspiracy to cheat and defraud.

   B. Because no crime is charged in Count II of the information.

2. Because the verdict of the jury is contrary to the evidence in that:

   A. There is no evidence that the defendants agreed to make representations to the complainants of any past or existing fact, and no evidence of any agreement that the complainants would rely thereon.

3. Because the jury having found that the defendants

were not guilty of having fraudulently obtained property of the complainants by statements of past or existing facts which were untrue and upon which the complainants relied, the finding of guilty on the conspiracy count finds no basis in law since there is no evidence of any agreement to which the complainants were a party and to which they agreed to rely upon, misstatements of past and existing facts.

4. Because the Court erred in admitting into evidence over the objections of these defendants, the statement of Fred Bernard DeGillio, taken from him after his arrest and the statement of Milton Silverman, taken from him after his arrest.

5. Because the Court erred in denying Defendants' Motion to Quash the Information prior to the jury being impaneled, in which motion it was alleged:

A. That the evidence before the examining magistrate failed to disclose that the defendants committed any crime.

B. That the defendants were denied their right to counsel, in violation of the Constitution of the United States and the Constitution of the State of Michigan.

6. Because the Court erred in failing to give the jury the following charge requested by the defendants:

"I charge you that statements offered in evidence after the arrest of the defendants cannot be considered by you in this case, and you should disregard the statements."

7. Because the closing argument of the Prosecuting Attorney was inflammatory, appealed to the passions and prejudices of the jury in his statement to that jury:

A. That these defendants cheated the Laverocks; stole from the poor.

B. His statements to the jury to bring in a verdict of guilty solely to impress upon the defendants that the local citizenry does not want foreigners to come into the community and cheat the local citizenry.

8. That the evidence fails to disclose venue of the alleged crime within the jurisdiction of his Court.

This motion is based upon the files and records in this cause and upon the affidavit hereto attached.

/s/ Samuel H. Rubin,
Attorney for Defendants,
3215 Cadillac Tower,
Detroit 26, Michigan.

Dated: May 17, 1961.

State of Michigan,
County of Wayne—ss.

Samuel H. Rubin, being duly sworn, deposes and says that he is the attorney for Fred Bernard DeGillio and Milton Silverman, the defendants herein; that he has read the foregoing motion; that in his opinion the conviction of the defendants is erroneous; that said motion is meritorious and is not filed for the purpose of delay.

/s/ Samuel H. Rubin

Subscribed and sworn to before me this 17th day of May, 1961.

/s/ Olga B. Kranšć,
Notary Public, Wayne County, Michigan.
My Commission expires December 14, 1962

EXCERPTS FROM PROCEEDINGS OF JULY 18, 1961

STATE OF MICHIGAN—In the Circuit Court for the County of Genesee.

The People of the State of Michigan,
v.
Fred B. DeGillio and Milton Silverman, Defendants. } No.

Proceedings had in the above entitled cause before Donn D. Parker, Circuit Judge, Genesee County Courthouse, Flint, Michigan, on July 18, 1961.

Appearances: Samuel Rubin, Counsel for the respondents.

* * * * * *

The Court: * * * (3) In discussing the claims and reasons given for a new trial, the Court will discuss them in the order they are presented in the defendant's motion, starting with 1 (a). Counsel addresses this objection to the form in which the verdict was delivered by the jury. Although the foreman fumbled a little bit with his words, it was clear and convincing to the Court what he intended to express, and the jurors so indicated, and that was clearly not guilty as to Count 1 and guilty on Count 2, the conspiracy count.

* * * * *

(4) 4, which has to do with the statements of the two respondents which were admitted into evidence; the true situation here is, I think, that the statements and their contents contained no evidence of anything, either guilt or innocence, and the Court feels it gave an adequate instruction regarding their effect.

* * * * *

. 6, which is my failure to give the charge requested by the defendant; this is very similar (5) to 4—I guess it is. I can't see how the defense was prejudiced here. I'll say the same thing I said on number 4, and that is that the statements, so-called, were really evidence of nothing. My memory is that all that was in them was the name and address and very little more, and at most they were surplusage, and the Court still thinks the instruction that he gave regarding them was the proper law in Michigan and I cannot find that it prejudiced the defendants in any way.

. . . . . .

In general, the Court will say it thought there was plenty of evidence of the defendants agreeing to accomplish a lawful purpose by unlawful means, and that none of the matters complained of resulted in a miscarriage of justice, and that if any irregularities do exist in the proceedings, they are so unimportant they would (6) not warrant the granting of a new trial. Accordingly, defendant's motions are denied.

. . . . . .

(7) The Court: Well, I'll not—I'll deny that motion. I mean we might as well get the sentence final and you on your road to the Supreme Court.

. . . . . .

(8) Mr. DeGillio, you have been convicted of conspiracy to cheat and defraud with false pretenses. At the outset the Court wants you to understand fully that there is nothing illegal about purchasing equities in real estate or anything else, by lawful means. It is illegal, however, and it's one of the oldest crimes known to the law, to agree or to conspire with another to purchase equities or anything else, by unlawful methods or means.

. . . . . .

ORDER OF SUPREME COURT DENYING LEAVE TO APPEAL

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 8th day of August in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

In this cause an application is filed by defendants for leave to appeal from an order of the Circuit Court for the County of Genesee and a brief in opposition thereto having been filed by plaintiff and due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby Denied.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of August in the year of our Lord one thousand nine hundred and sixty-one.

s Donald F Winters,
Clerk.

(Seal)

ORDER OF SUPREME COURT DENYING REHEARING

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court-Room, in the Capitol, in the City of Lansing, on the 21st day of September in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

In this cause a motion is filed by defendants for a reconsideration of the order heretofore entered herein on August 8, 1961, and an answer thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the order heretofore entered herein on August 8, 1961 denying leave to appeal stand affirmed.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, t. is 27th day of September in the year of our Lord one thousand nine hundred and sixty-one.

s/ Donald F. Winters,
Clerk.

(Seal)

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON 25, D.C.

January 22, 1962

RE: DeGILLIO, ET AL. v. MICHIGAN, No. 593, OCT. TERM, 1961:

Dear Sir:

The Court today entered the following order in the above entitled case:

"The petition for writ of certiorari is denied. Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan are of the opinion that certiorari should be granted."

Very truly yours,
JOHN F. DAVIS, Clerk
By EDWARD SCHADE
Assistant

ECS: ht
Alan J. Stone, Esq.
Stone & Pliskow
3215 Cadillac Tower
Detroit 26, Mich.
AIRMAIL

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

People of the State of Michigan

vs.

Fred Bernard DeGillio and
Milton Silverman,

Defendants

Criminal File
No. 17969

RULING ON APPLICATION FOR LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL

The motion for leave to file a delayed motion for a new trial is denied for the following reason:

Each issue raised therein has been ruled upon by this Court either in preliminary motions before trial, or in the original motion for a new trial, which gave the Court's reasons and authority for the rulings. They have also been raised and reviewed in one form or another in the application for leave to appeal to the Supreme Court prelimenary to trial, in the application for leave to appeal subsequent to trial, and in the request for rehearing thereon.

The Court has not changed its opinion on its original rulings and there being no new issues the granting of leave to file a delayed motion for a new trial would serve no purpose.

Dated: December 12, 1962.

DONN D. PARKER, Circuit Judge.

cc: Walter [redacted]kuta
Prosecuting Attorney
106 Court House
Flint, Michigan
Goldfarb & Hudnut
2091 Cadillac Tower
Detroit 26, Michigan

ORDER OF SUPREME COURT DENYING LEAVE TO APPEAL

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the Capitol, in the City of Lansing, on the 10th day of April in the year of our Lord one thousand nine hundred and sixty-three.

Present the Honorable
JOHN R. DETHMERS,
Chief Justice,
LELAND W. CARR,
HARRY F. KELLY,
OTIS SMITH,
EUGENE F. BLACK,
MICHAEL O'HARA
THOMAS M. KAVANAGH,
THEODORE SOURIS,
Associate Justices.

The People of the State of Michigan,
Plaintiff,
vs.
Fred Bernard DeGillio and Milton Silverman,
Defendants.
50223

In this cause an application is filed by defendants for leave to appeal from an order of the Circuit Court for the County of Genesee and a brief in opposition thereto having been filed by plaintiff and due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 10th day of April in the year of our Lord one thousand nine hundred and sixty-three.

DONALD F. WINTERS, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1963

FRED BERNARD DeGILLIO and MILTON SILVERMAN Petitioners vs THE PEOPLE OF THE STATE OF MICHIGAN Respondents	No 263

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

FRANK J KELLEY
Attorney General

Robert A. DeMaggio
Solicitor General

Daniel J. Kelly
Assistant Attorney General

Attorneys for Respondents

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Michigan Code of Criminal Procedure, Chapter VI, Secs. 1 through Sec. 13, MSA §28.919 et seq; CL 1948 §766.1 et seq 5c

C. Excerpts from petitioners closing argument 11c

*Note — Pages of petitioners appendix are numbered and followed by a small "b". Respondents to prevent confusion have therefore used a small "c" following each page of respondents appendix.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

FRED BERNARD DeGILLIO and MILTON SILVERMAN, Petitioners, vs. THE PEOPLE OF THE STATE OF MICHIGAN, Respondents.	No. 263

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

Opinions Below

The ruling of the lower court on Petitioners' motion for a direct verdict or a new trial is printed in full as Respondent's Appendix A. (1c). Certain excerpts of this ruling are found in Petitioners' Appendix page 31b.

Questions Presented

1. Were Petitioners' federal constitutional rights violated by the lower court's refusal to quash the Information

or remand for further examination where the petitioners based their demand for this relief on the examining magistrates refusal to adjourn for a second time the examination because the petitioners appeared without counsel, although they had retained counsel and knew that previous to the hearing that said counsel would not represent them because he was too busy handling other business.

2. Were the Petitioners denied due process of law by the admission into evidence of a record of a short conversation the prosecutor had with petitioners at the time of their arrest and before petitioners were allowed to contact their attorney?

3. Did the Information charge the petitioners with a crime under Michigan law and was the Information so vague and indefinite as to deny the petitioners due process of law?

Statement of the Case

On January 18, 1961 Petitioners were arrested on a warrant charging them with obtaining property by false pretenses and conspiracy to obtain property under false pretenses (1b). On the day of their arrest the prosecuting attorney had a ten minute conversation with Petitioner DeGillio and a five minute conversation with Petitioner Silverman (4b). The purpose of this conversation was to learn the proper names of Petitioners, their addresses, ages, occupations, marital status, associates, places of business, whether they knew the complainant, and whether they had been arrested before or convicted of a crime (4b). Petitioner Silverman gave only his name and address (4b) and Petitioner DeGillio answered the prosecutors questions (7b). At the time of this conversation both Petitioners

knew of their rights to counsel and were advised they would be allowed to contact counsel (4b, 8b).

The Petitioners were arraigned on the warrant before a magistrate and by their counsel, a Mr. Goldfarb, they demanded an examination, and an examination was set for January 26, 1961 in compliance with the Michigan statute requiring the examination to be held within 10 days (6c). Two days before the examination their present attorney, Albert Goldfarb contacted the prosecuting attorney and requested a continuance. At the suggestion of Mr. Goldfarb, February 15, 1961 was agreed upon as the date for the examination (14b). The Municipal Judge approved and the subpoenas issued to a large number of witnesses were withdrawn and reissued for February 15, 1961.

The day before the date set for the examination, Petitioner Silverman appeared in the office of the prosecutor with a letter directed to the prosecuting attorney from Albert Goldfarb seeking another continuance (13b). At this time Petitioner Silverman was advised that witnesses had been subpoenaed and that it would be impossible to call the subpoenas off, and that, therefore, he should appear the following day in Municipal Court with an attorney ready to proceed with the examination (14b). Petitioner Silverman was also advised that if the Municipal Judge felt inclined to grant the continuance, the prosecutor would not object, however, the prosecutor would make clear to the Court the added expense and inconvenience that would result from such continuance.

On February 15, 1961 Petitioners appeared in Court for the examination without an attorney. Petitioner Silverman indicated by his statement at the examination that he had given the examining magistrate a copy of the letter Peti-

tioner had given the prosecuting attorney the previous day stating in effect that his attorney, Mr. Goldfarb, was busy in Detroit and desired a continuance (13b).

Petitioner Silverman advised the Court that he had spoken to the prosecuting attorney and that the prosecutor had stated in effect that he had no objection to the adjournment (13b). After this statement was made by Petitioner Silverman the following statements were made by the prosecutor and the judge:

> "Mr. Leonard: Secondly, Mr. Silverman is not correct when he says I told him today would be all right with me. My statement was that if the Judge agrees with that I would have no argument against it. However, I have issued or had subpoenas issued for these witnesses, they have been subpoenaed, and it would be difficult to call them off. Now, we have subpoenaed eight or ten witnesses, your Honor, and they are present in court and we are ready to proceed.
>
> "The Court: I think that there's one thing that's been overlooked here, too. In the first place, both respondents were represented by Mr. Goldberg and then substitution of attorneys was made and there was a request then for an adjournment and I wasn't going to adjourn the case then, I saw no reason for it; and the only reason it was adjourned last time was on the request of the Prosecuting Attorney that there be an adjournment. As I understand it, it was definitely understood that there would be no further adjournment, and that Mr. Goldfarb had his business in such a condition that he would be able to be here and represent him. If he didn't, that's too bad, as far as I am concerned. Counsel or no counsel, as far as I am

concerned, the case will proceed as scheduled."

The magistrate proceeded to hold the examination and bound the petitioners over for trial to the Circuit Court.

On the day set for arraignment in Circuit Court, February 20, 1961, Petitioners appeared with two attorneys and moved to quash the Information or remand the case for further examination. It was necessary for the Court to adjourn the matter for two weeks on the grounds that the People had not received the proper notice.

The Petitioners' reasons for asking to quash or remand were:

1. Because the alleged preliminary examination upon which certain information is based fails to disclose that the Defendants committed any crime.

2. Because at said alleged preliminary examination, the Defendants' rights were violated in a manner repugnant to their rights under the Constitution of the United States and of the Constitution of the State of Michigan, in that they were denied the right to be represented by counsel, in violation of Article VI of the United States Constitution and Article II, Section 19 of the Constitution of the State of Michigan.

3. Because the examining magistrate lacked jurisdiction and said proceedings were conducted in violation of Section 28.922 of the Michigan Statutes Annotated.

4. Without waiving the benefit of the foregoing Motion, Defendants in the alternative, request the Court to remand this cause to the examining magistrate for further hearing so that these Defendants might urge the grounds hereini-

before set forth as a basis for quashing the complaint and warrant. (19b)

At the appropriate time the motion was argued and on March 9, 1961 it was denied by the Circuit Judge. The lower Court found specifically:

1. That sufficient evidence appeared in the transcript taken at the examination to warrant Petitioners being bound over to Circuit Court.

2. That Petitioners had waived the ten days provision of the statute and requested an adjournment on January 23, 1963.

3. That Petitioners did have counsel and counsel failed to appear.

4. That representation by counsel on examination is permissible not mandatory and in the alternative if representation is mandatory then it is not a right to a specific attorney if such an attorney is too busy to handle his clients affairs. (24b).

The case proceeded to trial and at the trial the stenographic records of the conversation between the prosecutor and petitioners on January 18, 1961 were introduced into evidence over the objections of the Petitioners' attorney. The Court directed a verdict of not guilty on Count 1, obtaining property by false pretenses, and the jury found Petitioners guilty of conspiracy to obtain property by false pretenses.

The Petitioners moved for a new trial raising the issues covered by the Motion to Quash and alleging also that the

Judge should have instructed the jury to not consider the statements made by both Petitioners at the time of their arrest (29b).

The trial judge denied the motion for a new trial stating that with regard to the statements of the two Petitioners, the Court found that the statements contained no evidence of anything either of guilt or innocence, and that there was plenty of evidence of the Petitioners agreeing to accomplish a lawful purpose by unlawful means, and that none of the matters complained of resulted in a miscarriage of justice. The Judge added further, that if any irregularities do exist they were so unimportant that it would not warrant granting a new trial (1c).

Petitioners applied for a leave to appeal in the Michigan Supreme Court. This was denied on September 27, 1961 (33b). Petitioners petitioned to the United States Supreme Court for a writ of certiorari to the United States Supreme Court. This was denied on January 22, 1962 (35b).

The Petitioners then proceeded to file another motion for a new trial and this was denied on December 12, 1962 (36b). Petitioners applied for a leave to appeal the decision to the Michigan Supreme Court and this was denied on April 10, 1963 (37b). The Petitioners have now petitioned a second time to the U. S. Supreme Court for a writ of certiorari to the Michigan Supreme Court.

ARGUMENT

I

PETITIONERS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE LOWER COURT'S REFUSAL TO QUASH THE INFORMATION OR REMAND FOR FURTHER EXAMINATION.

Under Michigan procedure in criminal cases, the examining magistrate has no authority to adjourn an examination unless in his discretion it shall clearly appear by sufficient showing that the reasons for the adjournment are founded upon strict necessity and that the examination cannot be had or a manifest injustice will be done. CL 1948, 766.7; MSA 28.925 (7c).

This procedure is clearly designed to frustrate attempts by both the prosecutor and the defendant to prolong proceedings so that justice cannot be done.

The examination under the statute must be made promptly. The statute specifically provides that the magistrate before whom a person is brought on a charge not cognizable by the justice of the peace shall set a day for examination not exceeding ten days thereafter. CL 1948 766.4; MSA 28.922 (6c).

The reasons stated by Petitioners for quashing the Information were that the examination failed to disclose Petitioners had committed any crime and that Petitioners were denied the right to be represented by counsel and that the magistrate had no jurisdiction under MSA 28.922 (19b).

With regard to the question of loss of jurisdiction, the

Petitioners requested the adjournment of the examination set for January 26, and it was granted. The trial judge held this to be a waiver of the ten day rule (24b). In view of the proceedings since that day, it is clear that Petitioners would have claimed that their constitutional rights would have been violated if the judge had not granted the adjournment. So on this point the Petitioners appear to say that it would be an error to grant the adjournment and it would be an error for the judge not to grant the adjournment. This point was clearly frivolous.

With regard to the question of whether the examination failed to disclose that Petitioners committed any crime, it must be noted first that the purpose of the examination, to be more specific, is to decide whether a crime has been committed and whether there is probable cause shown by competent evidence to believe the Petitioners guilt thereof. *Gaffney v. Circuit Judge*, 85 Mich. 138.

In this case a transcript of the case was available (24b). The judge read the transcript and held that evidence introduced established that a crime had been committed and there was probable cause shown to believe Petitioners guilty thereof.

The Petitioners did not allege nor did they maintain that any incompetent or inadmissible evidence was introduced at the examination, and they could have determined this simply by reading the transcript. So, except for the question of counsel, they did not allege that anything irregular occurred during the examination. The one question they raised was one of law, viz., accepting as competent all testimony introduced, did the examination establish that a crime was committed and that there was probable cause to believe the Petitioners guilty thereof? The Circuit Judge

held that it did and the Circuit Court's position was sustained twice by the Michigan Supreme Court. This should conclusively settle this issue.

With regard to the question of counsel in view of the Michigan statutes providing for the adjournment of an examination, the question is did the decision of the examining magistrate not to adjourn the hearing result in a manifest injustice. The Petitioners make no attempt to show that a manifest injustice occurred. They seem to hold blindly to a proposition that an examination, or for that matter any criminal proceedings, cannot proceed under any circumstances if the Petitioners do not have their attorney present. This is the position taken by the Petitioners on their motion to quash. They did not allege or show that error occurred or injustice resulted because Petitioners failed to make ararngements for counsel or that they were denied the right to obtain counsel. They did not allege any fact which would sustain a finding that a manifest injustice occurred, they stated only that their attorney was too busy somewhere else.

Petitioners' point is clearly without merit. The examining magistrate acted reasonably, allowed one adjournment beyond the statutory ten days. At that time subpoenas had to be withdrawn and new subpoenas were issued for the day Petitioners agreed upon for the examination. Then Petitioners' attorney did not even bother to file a motion or appear before the Court. The day before the examination the Petitioners simply advised the Court that their attorney was too busy to represent them. This maneuver by Petitioners and their attorney was no more than an attempt to dictate terms to the Court on a take it or leave it basis and was clearly contrary to the express terms of the statute.

It must be observed also that under Michigan law the rights of a defendant are not waived at the examination. A defendant is at liberty to attack the information or to challenge the competency of evidence introduced at the examination at any time until he enters his plea upon arraignment on the Information in Circuit Court. In the present case the Petitioners, represented by two attorneys, moved to quash or remand before a plea was entered. This was proper procedure. All Petitioners were required to do then was to show that a manifest injustice occurred or that other good reasons existed for further examination. This they did not do and to the contrary they accepted the examination proofs and merely asked the Court whether as a matter of law it was sufficient to sustain the Information. The Court held it did.

In view of a complete failure on the part of Petitioners to show a manifest injustice, the Circuit Judge necessarily found that the examining magistrate did not abuse his discretion. Since it is well settled that absent abuse of discretion by the magistrate, the Court will not review matters pertaining to a continuance or an adjournment Petitioners' point is clearly without merit: *Isaacs v. United States*, 159 U.S. 487, p. 489 and *Avery v. Alabama*, 308 U.S. 444, p. 446.

A total lack of merit is indicated also by the fact that the Petitioners do not cite one case which will support their position. Both Petitioners were, in the words of their own attorney, sharp business men (11c). They knew of their rights to counsel as demonstrated by virtually their first words to the prosecutor when they were arrested (4b). They were represented by an attorney on their arraignment on the warrant and they arranged for another attorney, Mr. Goldfarb. This attorney, two days before the

original time set for the examination, asked for an adjournment. This was granted. Then both Petitioners and their attorney obviously decided that petitioners would appear without counsel and try to force another adjournment. This was their decision to make. They made the decision and they have clearly no basis for claiming that the People of the State of Michigan violated their constitutional rights.

II

THE PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF PETITIONERS' VOLUNTARY STATEMENTS MADE AT THE TIME OF THEIR ARREST.

The Michigan statutes provide that no verdict shall be set aside or reversed or a new trial be granted on the ground of misdirection of the jury, or the improper admission or rejection of evidence, unless after an examination of this entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. CL 1948 §769.26, MSA §28.1096 (5c).

The statements made by both Petitioners were voluntary. They were made with full knowledge of their right not to answer questions and their right to counsel. The conversation continued for five minutes in one case, and ten minutes in the other. In view of this fact, to the extent that the conversations contained admissions relevant to the issues, they clearly were admissible. The trial judge on the motion for a new trial, however, was not called upon under Michigan procedure to determine the technical question of relevancy. Under the statute cited above the judge is required to examine the entire cause and grant the motion only if

it affirmatively appears that a miscarriage of justice resulted. The judge found that there was plenty of evidence independent of these statements establishing the guilt of Petitioners, and if the admission of these statements was in any way irregular it did not result in a miscarriage of justice. (4c)

It must be noted that the Petitioners have made no attempt to distinguish between the statement of Petitioner Silverman and the statement of Petitioner DeGillio and insisted upon an instruction that both be disregarded (29b). With regard to the statement of DeGillio, this statement dealt with his employment and membership in a certain union. This would appear to be relevant and material and therefore admissible. Since Michigan law requires that the entire statement of the person be admitted, *People v. Hepner*, 285 Mich 640, the prosecutor had to offer the statement, even though the Petitioners' answers to questions concerning previous arrests were more favorable to the defense than to the People. The only possible irregularity, therefore, was the consideration of the jury of the statement made by Petitioner Silverman. Considering, however, the fact that the trial judge found that plenty of evidence was introduced to establish Petitioner's guilt (2c), the admission of this brief statement consisting of no more than a refusal to answer a few questions clearly did not result in a miscarriage of justice.

The cases cited by Petitioners on this issue are not in point. There was no evidence introduced of any previous conviction and there was no repeated and persistent introduction of evidence reflecting in any way on the possibility of previous convictions. There was no error of any kind which affected the substantial right of Petitioners.

III

THE INFORMATION IN CLEAR AND DEFINITE TERMS CHARGED THE PETITIONERS WITH A CRIME UNDER MICHIGAN LAW.

Sixty years ago in the case of *People v. Butler*, 111 Mich. 483, the Michigan Supreme Court considered the validity of an Information almost identical to the one in this case. The following excerpt from this case is pertinent:

> "MOORE, J. The respondent was convicted in the recorder's court, and appeals to this court. The information filed in this case reads as follows:
>
> 'That Daniel M. Butler and William H. Bird, late of said city of Detroit, heretofore, to wit, on the 1st day of May, in A.D. 1895, at the said city of Detroit, in the county aforesaid, unlawfully, falsely, deceitfully, and fraudulently did combine, conspire, confederate, and agree together, by divers false pretenses, subtle means, and devices, to attain and acquire unto themselves, of and from the county of Wayne, a sum of money, to wit, the sum of fifty dollars, of the value of fifty dollars, of the money of it, the said county of Wayne, and to cheat and defraud it, the said county of Wayne, thereof, to the great damage of it, the said county of Wayne.'
>
> "It is the claim of the respondent that this information should have been quashed,—*First*, because it states no offense known to the law; *second*, because it contains no allegations of the means by which respondents conspired to cheat and defraud. The claim of the

respondent cannot be sustained. The case is ruled by *People v. Richards*, 1 Mich. 216 (51 Am. Dec. 75); *People v. Clark*, 10 Mich. 310; *People v. Winslow*, 39 Mich. 505; *People v. Petheram*, 64 Mich. 252; *People v. Watson*, 75 Mich. 582; *People v. Dyer*, 79 Mich. 480".

This case and seven other Michigan cases were cited by the trial judge in support of his holding that the information was valid (2c). These cases are not mentioned in Petitioners' brief. However, Petitioners do cite *Alderman v. People*, 4 Mich. 414. The indictment in this case was defective because in the words of the Court "there (was) * * * no allegation whatsoever that in obtaining the goods, any false pretenses, * * * was to be used." The distinction between this case and the present case is obvious.

The information in the *Barkelow* case, 37 Mich. 455, which is relied on by the Petitioners was defective because it alleged that cheating and defrauding were to be done by unlawful, illegal, dishonest, corrupt, and indirect means and devices. The Court stated that all of these may fall outside of any legal definition of a crime. The Court also found the information ambiguous for other reasons.

Petitioners also cited *Parr v. United States*, 362 U.S. 370 and *Russel v. United States*, 369 U.S. 749. In the *Parr* case the Court found that the act complained of was no violation of the federal law and, therefore, conspiracy to do that act would not violate the federal law. The *Russel* case also concerned federal law and the Court held that where the statute makes it a violation of the law not to answer questions pertinent to the subject of inquiry, the defendant must be advised as to what the subject of the inquiry is so that he can defend himself. These cases clearly do not support the position taken by the Petitioners.

In view of *People v. Butler*, supra, and the cases cited by the trial judge, Petitioners' assertion that the information is unconstitutional, vague and indefinite is patently without foundation.

CONCLUSION

It is respectfully submitted that for the reasons stated above the petition for certiorari should be denied. There are no special and important reasons for reviewing by a writ of certiorari the Michigan Supreme Court decision in this case. Petitioners raise no federal questions of substance not previously determined by the United States Supreme Court and the decision of the Michigan Supreme Court is clearly correct.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Donald T. Kane
Assistant Attorney General

Attorneys for Respondent
The Capitol
Lansing 2, Michigan

APPENDIX

APPENDIX A

LOWER COURT'S RULING ON PETITIONERS MOTION FOR NEW TRIAL

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OF GENESEE

THE PEOPLE OF THE STATE OF MICHIGAN **vs.** **FRED B. DEGILLIO and MILTON SILVERMAN,** **Defendants**	

Proceedings had in the above titled cause before DONN D. PARKER, Circuit Judge, Genesee County Courthouse, Flint, Michigan, on July 18, 1961.

* * * * *

THE COURT: The motion that's pending, as I understand it, is divided into two parts. First, that the, what counsel has called that the judgment of conviction be arrested, and which I understand to really be in effect, a motion that the Court direct a verdict of not guilty. That's what it is in substance, isn't it, sir?

MR. RUBIN: Yes, your Honor.

THE COURT: And also that, in the alternative, the Court grant a new trial.

The Court will decline to direct a verdict of not guilty on Count 2, affirming its pretrial ruling that the crime was stated in the information and reiterating its belief that there was sufficient evidence produced on behalf of the People.

In discussing the claims and reasons given for a new trial, the Court will discuss them in the order they are presented in the defendant's motion, starting with 1(a). Counsel addresses this objection to the form in which the verdict was delivered by the jury. Although the foreman fumbled a little bit with his words, it was clear and convincing to the Court what he intended to express, and the jurors so indicated, and that was clearly not guilty as to Count 1 and guilty on Count 2, the conspiracy count.

On 1(b) where the defense alleges there is no crime charged in Count 2, this has been ruled on heretofore and I think repetition is unnecessary. There are certain authorities I should put in this: *People v. Heath*, 277 Mich 473; *People v. Butler*, 111 Mich 483; *People v. Clark*, 10 Mich 310; *People v. Summers*, 115 Mich 537; *People v. Norwood*, 312 Mich 266; *People v. Petheram*, 64 Mich 252; and *People v. Gilman*, 121 Mich 187.

Reason 2(a) which, in substance, is that of insufficiency of evidence, and the Court will say that it disagrees with this assertion; that I think the Court stated in its charge specifically that the plans to occupy a dwelling in the future were not existing facts and should be disregarded by the jury, however, the representations regarding the purchaser's job and his ability to pay and the legal effect of papers supposedly releasing the sellers from this mortgage and note liability were, under the circumstances, clearly representations of fact. And the Court might add that a review of DeGillio's testimony, alone, under cross examina-

tion, should lay at rest for all time any argument as to the sufficiency of the evidence.

3. Well, the Court just disagrees with defense counsel on the law on number 3, and will refer both counsel to the cases I previously cited.

4, which has to do with the statements of the two respondents which were admitted into evidence; the true situation here is, I think, that the statements and their contents contained no evidence of anything, either guilt or innocence, and the Court feels it gave an adequate instruction regarding their effect.

5. (a) and (b): This matter was ruled on before trial and it was presented to the Supreme Court and in an application for leave to appeal, and this Court has not changed its position on those matters.

6, which is my failure to give the charge requested by the defendants, this is very similar to 4—I guess it is. I can't see how the defense was prejudiced here. I'll say the same thing I said on number 4, and that is that the statements, so-called, were really evidence of nothing. My memory is that all that was in them was the name and address and very little more, and at most they were surplusage, and the Court still thinks the instruction that he gave regarding them was the proper law in Michigan and I cannot find that it prejudiced the defendants in any way.

7(a) and (b): Prejudicial arguments of counsel, particularly the prosecutor. I can't feel that that argument transgressed the boundaries of proper argument. Both counsel were fairly windy in this matter and rambled far afield. I think it was about par for both.

8; venue. Venue in a conspiracy is where any overt act takes place; *People v. Pettijohn*, 283 Mich 108, *People v. Ranney*, 304 Mich 315, *People v. Arnold*, 46 Mich 268.

In general, the Court will say it thought there was plenty of evidence of the defendants agreeing to accomplish a lawful purpose by unlawful means, and that none of the matters complained of resulted in a miscarriage of justice, and that if any irregularities do exist in the proceedings, they are so unimportant they would not warrant the granting of a new trial. Accordingly, defendants' motions are denied.

APPENDIX "B"

STATUTES INVOLVED

Michigan Code of Criminal Procedure, Chapter IX, Judgment and Sentence

Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. (C.L. '48, §769.26; C.L. '29, §17354.)

Michigan Code of Criminal Procedures, Chapter VI, Examination of Offenders

Section 1. The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination. (C.L. '48, §766.1; C.L. '29, §17193.)

Sec. 2. Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him. (C.L. '48, §766.2; C.L. '29, §17194.)

Sec. 3. If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein. (C.L. '48, §766.3; C.L. '29, §17195.)

Sec. 4. The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent. (C.L. '48, §766.4; C.L. '29, §17196.)

Sec. 5. If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial. (C.L. '48, §766.5; C.L. '29, §17197.)

Sec. 6. Any magistrate to whom complaint is made, or before whom any prisoner is brought, may associate with himself one or more other magistrates of the same county,

and they may together execute the powers and duties conferred upon such magistrates respectively by this chapter, but no fees shall be taxed for such associates. (C.L. '48, §766.6; C.L. '29, §17198.)

Sec. 7. Any magistrate may adjourn an examination for an offense not cognizable by him if the same be necessary, to the same or a different place in the county as such magistrate shall deem necessary; and in such case the accused may in the meantime be committed either to the county jail or to the custody of the officer by whom he was arrested or to any other officer; or, unless he shall be charged with treason or murder, he may be recognized in a sum and with sureties to the satisfaction of the magistrate, for his appearance before such magistrate for further examination: Provided, That no adjournments, continuances or delays of such examination shall be granted by such magistrate except for good cause shown: And provided further, That no magistrate shall adjourn, continue or delay the examination of any cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said magistrate to be entered upon the record that the reasons for such consent are founded upon strict necessity and that the examination of said cause cannot then be had, or a manifest injustice will be done. No action on the part of the magistrate in adjourning or continuing any case, shall cause said magistrate to lose jurisdiction of said case. (C.L. '48, §766.7; C.L. '29, §17199.)

Sec. 8. The person accused may be committed as provided in the preceding section by the verbal order of the magistrate, or by a warrant under his hand, stating that he is committed for such further examination on a day to be named in the warrant; and on the day therein specified, he may be brought before the magistrate by his verbal

order to the same officer by or to whose custody he was committed, or by an order in writing to a different officer. (C.L. '48, §766.8; C.L. '29, §17200.)

Sec. 9. On the preliminary examination of every person charged with the offense of rape, assault with intent to commit rape, seduction, adultery, bastardy or other offense against chastity, morality or decency, it shall be in the discretion of the examining magistrate to exclude from the place where such examination is held, any or all persons not officers of the court, or persons by law required to be in attendance. (C.L. '48, §766.9; C.L. '29, §17201.)

Sec. 10. The magistrate while conducting such examination may exclude from the place of the examination all the witnesses who have not been examined; and he may also, if requested or if he sees cause, direct the witnesses whether for or against the prisoner, to be kept separate so that they cannot converse with each other until they shall have been examined. And such magistrate may in his discretion, also exclude from the place of examination any or all minors during the examination of such witnesses. (C.L. '48, §766.10; C.L. '29, §17202.)

Sec. 11. Witnesses may be compelled to appear before such magistrate by subpoenas issued by him, or by any officer or court authorized to issue subpoenas, in the same manner and with the like effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before justices of the peace; and the evidence given by the witnesses examined shall be reduced to writing by such magistrate, or under his direction and shall be signed by the witnesses respectively: Provided, That, unless otherwise provided by law, the evidence so given shall be taken down in shorthand by a county stenographer where one has been appointed

under the provision of any local act of the legislature or by the board of supervisors of the county wherein such examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of said county with the consent of the respondent or his attorney to act as official stenographer pro tem. for the court of such magistrate to take down in shorthand the testimony of any such examination, and any stenographer so appointed shall take the constitutional oath as such official stenographer and shall be entitled to the following fees: $6.00 for each day and $3.00 for each half day while so employed in taking down such testimony and 10 cents per folio for typewriting such testimony so taken down in shorthand, or such other compensation and fees as shall be fixed by the board of supervisors appointing such stenographer, and the same may be allowed and paid out of the treasury of the county in which such testimony is taken: Provided further, That it shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by such stenographer above provided, to sign such testimony, but any witness or witnesses shall have the right to have such testimony read to them upon their request. Such testimony, after being typewritten, shall be received and filed in the court to which the accused is held for trial without the signature of such witness or witnesses for the same purpose and with like effect as the testimony of witnesses hereinabove provided, which is signed by such witness or witnesses and such testimony so taken shall be considered prima facie evidence of the testimony of such witness or witnesses at such examination. (C.L. '48, 7766.11; C.L. '29, 17203.)

Sec. 12. After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined, and cross-examined

and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution. (C.L. '48, §766.12; C.L. '29, §17204.)

Sec. 13. If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith; he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial. (C.L. '48, §766.13; C.L. '29, §17205.)

APPENDIX "C"

EXCERPTS FROM PETITIONERS CLOSING ARGUMENT

(Numbers in parentheses ( ) refer to pages of transcript)

(38) (Mr. Rubin)

They are business men, they buy and sell; good, bad, sharp, maybe. I must comment on that for a minute. Every business man is sharp. Did you ever walk into a business store when they are trying to sell you something on credit? The pressure is there. Better than that, when I go into a barber shop and all I want is a shave, they really pressure me in for a tonic, hair cut and a massage, and they really con me into it. Of course that's business.

In this instance when these people ran after them, "how much will you give me so I can get out," of course there was no pressure when these people vacate a house and walk in and try to buy the equity—just the equity—and they say, "No, I'll bargain," they walk out, don't pay. The seller gets a little nervous, drops his price; pressure, that's business. Of course I might tell you what a beautiful wife that hasn't nothing to do with it—"I'm a Teamster, work in the Teamsters," and try to pressure you and make a deal, what's wrong with that? I might tell you I'll assume your mortgage and you say, "are you sure, Rubin?" and you say, "Yes, sir, yes, man," and I don't, all of that is what we call puffing up business pressure, call it a little chicanery if you will, I don't (39) kid anybody in our modern business world, it's business.